1990

David George, Estate of Betty George v. LDS Hospital, Kimball Lloyd, Michael Lahey : Brief in Opposition to Certiorari

Utah Supreme Court

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Brinton R. Burbidge, Merrill F. Nelson; Kirton, McConkie and Poelman; Elliot J. Williams, Larry R. Laycock; J. Anthony Eyre, Michael F. Skolnick; Attorneys for Petitioner.

 BRIEF 900502

IN THE SUPREME COURT OF THE STATE OF UTAH

DAVID GEORGE, individually, and as personal representative of the ESTATE OF BETTY GEORGE

Plaintiff-Respondent,

v.

LDS HOSPITAL, KIMBALL LLOYD, M.D., and MICHAEL LAHEY, M.D.,

Defendant-Petitioner.

Case No. 900502

RESPONDENT'S MEMORANDUM IN OPPOSITION TO LDS HOSPITAL'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Questions Presented By Petitioner:

1. Whether the court of appeals correctly reversed the jury verdict of no causation on grounds unrelated to the verdict or the issues raised by the parties.

2. Whether the court of appeals correctly ruled that jury instructions 16a and 21a regarding proof of negligence and proximate cause misstate Utah law and require a new trial.

Additional Question from Plaintiff-Respondent:

3. Whether the Court of Appeals correctly ruled that fundamentally prejudicial rulings throughout the trial, instructions requiring the jury to ignore plaintiff's experts' testimony and plaintiff's theory of the case, and failure to instruct the jury on plaintiff's theory of the case required a new trial.

4. Whether this Court should grant Certiorari.

OPINIONS BELOW

LDS Hospital's Petition for Writ of Certiorari challenges the decision of the Utah Court of Appeals in George v. LDS Hospital, 142 U.A.R. 27 (Utah App. 1990). That opinion is appended to this memorandum at Appendix pages 1-10. References will be made to the Appendix.

JURISDICTION

This Court has jurisdiction to review the court of appeals decision by a writ of certiorari pursuant to *Utah Code Ann.* §78-2-2(3)(a) and (5).

CONTROLLING AUTHORITIES

Utah Rules of Civil Procedure, Rule 51 [App. 26-28]

STATEMENT OF THE CASE

Plaintiff-respondent filed a negligence action against Dr. Kimball Lloyd, Dr. Michael Lahey and LDS Hospital. A settlement was reached with the physicians prior to trial. At trial, plaintiff claimed that the hospital's negligence and failure to procure obviously necessary medical care was a substantial factor, or contributing proximate cause of the cardiac arrest and subsequent death of Betty George. Though "present" at trial, no evidence was introduced regarding the physicians' standard of care or its breach.

The jury returned a Special Verdict finding the physicians were not negligent, that LDS Hospital was 100% negligent, but that said negligence was not the proximate cause of the death of Betty George. Plaintiff's Motion for a New trial was denied, and the case was appealed. On appeal, the Utah Court of Appeals reversed and remanded for a new trial, finding that fundamentally unfair rulings had deprived the plaintiff-respondent of a fair trial, that the jury had been improperly instructed to ignore plaintiff's expert evidence and theory of the case, and that the jury had been improperly instructed on causation. [App.1-10] The verdict of no cause of action against the physicians was properly affirmed. [*Id.* at 9] Because of the reversal on these bases, the Court of Appeals did not reach other errors claimed by the plaintiff-respondent. [*Id.* at 10]

STATEMENT OF THE FACTS

Plaintiff-respondent agrees with, and incorporates by reference the facts found by the Utah Court of Appeals. [App. 2-3]

ARGUMENT

POINT I: NO LEGITIMATE REASON TO GRANT CERTIORARI EXISTS IN THIS CASE.

Under Rule 46, *Rules of the Utah Supreme Court*, certiorari is a matter of judicial discretion to be granted only when there are "special and important reasons" to do so. LDS Hospital contends that the Court of Appeals "so far departed from the usual course of judicial proceedings" as to require the exercise this Court's power of supervision; and that the issues decided by the court of appeals were "important questions of first impression" which should be settled by this Court. [Brief of Petitioner at 6-7] Neither position is accurate.

LDS Hospital implies that just before leaving the bench, Judge Davidson went off on a wild tangent in his final decision, and rendered an opinion which was completely foreign to the issues before the court of appeals. [fn1] [Brief of Petitioner at 2] The suggestion overlooks the fact that the decision of the Court of Appeals was *unanimous*, with Judge Orme and Judge Bench concurring.

Nor did the trial of this matter, or its appeal, involve any questions of first impression. The case was garden variety medical negligence, and not very complicated. No physicians were involved, nor did plaintiff-respondent raise any issue involving medical diagnosis or treatment. Medical malpractice is simply a professional tort, governed by long established legal principles,

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[fn1] LDS hospital also implies that it was prejudiced by Judge Davidson's absence at oral argument. LDS Hospital fails to mention that Judge Orme stated before argument that Judge Davidson, who would write the decision, would be provided tapes of the argument. Petitioner was offered the opportunity to argue before a full panel, but declined.

and this case was no more than one involving the professional duty of hospital staff, its breach, and the result of that breach.

In any event, as developed below, this case was properly reversed and remanded, quite apart from any technical legal issues, on the basis of fundamental unfair and prejudicial rulings of the trial court which deprived plaintiff-respondent of a fair trial.

POINT II: PETITIONER MATERIALLY MISSTATES OR MISUNDERSTANDS THE ISSUES DETERMINED BY THE COURT OF APPEALS.

It is axiomatic, that each party is entitled to have the jury instructed on its theory of the case if there is evidence to support it. Pacific Chromalox Division v. Irey, 787 P.2d 1319 (Utah App. 1990); Carpet Barn v. State of Utah, 786 P.2d 770 (Utah App. 1990). The decision of the court of appeals in this case, correctly distilled, was that the jury was prohibited from considering plaintiff-respondent's theory of liability, when the trial court added instructions 16a and 21a. [App.6-9] Reversible error was manifest since those instructions fundamentally altered the plaintiff-respondent's burden of proof *after* both parties had rested. Plaintiff-respondent's theory for the hospital's liability had been completely accepted by the district court throughout the trial. Plaintiff-respondent's experts had been duly qualified and allowed to present evidence on duty, breach *and causation*. The last-minute instructions required the jury to ignore plaintiff-respondent's expert testimony, and much of his evidence. [App.6-7]

Rather than having "totally missed the major issue" [Brief of Petitioner at 8], the decision of the Court of Appeals goes right to the heart of the matter, specifically, that plaintiff-appellant was denied a fair trial. The relevant facts, briefly stated are as follows:

1. Plaintiff-respondent's case at trial was solely against LDS Hospital and its nursing and respiratory therapy staff;

2. Plaintiff-respondent's called a nurse and respiratory therapist who were duly qualified as experts to testify regarding duty, breach of duty, *and proximate cause.*

3. The trial court ruled repeatedly during the trial that the *proximate cause of Betty George's death* on August 4, 1986, as opposed to the cause of her cardiac arrest on August 2, 1986, *was irrelevant.* [App. at 6, fn.3]

4. The trial court specifically ruled, and instructed all counsel that it would permit no experts to be called on the issue of proximate cause of death. [*Id., see also,* App.11-16, which is Addendum II from plaintiff-respondent's opening brief before the court of appeals. This addendum sets forth the trial court's rulings verbatim, from the record.]

5. The trial court, over plaintiff-respondent's objections, subsequently permitted completely speculative testimony from three defense experts on that very issue. [App.7-8]

6. On the last day of trial, after both sides had rested, the trial court inserted instruction 16a, which had been specifically rejected the day before, and the previously unheard

of instruction 21a. These required plaintiff-respondent to prove proximate cause of death through the testimony of a physician or lose. [App.17-19]

Contrary to petitioner's implication, the court of appeals decision was based precisely on the major issue before it. The decision states:

> Defendant counters that an expert witness cannot testify about an area of medicine in which he or she is not personally familiar. The record clearly indicates, however, that Gillerman and Owings testified only to the standards of care in their respective fields. The trial court recognized these witnesses as experts and admitted their testimony, yet the court, through the jury instructions, prevented the jury from considering their testimony. [App.6]

The testimony of these experts completely covered plaintiff-respondent's burden of proof, including the standard of care, its breach and damages proximately caused thereby. As the Court of Appeals held:

> This error was compounded by the court consistently stating throughout the trial that cause of death was not an issue in the case and that expert testimony need not address that subject, only to give the jury instruction focusing on causation as established by medical testimony. [*Id.* at fn.3]

In a subsequent section of its decision entitled PROXIMATE CAUSE, the court of appeals correctly set forth law establishing that the question of whether the negligence of a hospital staff was a contributing proximate cause of a patient's injuries, is one of fact for the jury, then specifically held:

> A jury could have reasonably concluded that the failure of the nurses to notify Dr. Lloyd or Dr. Lahey of Mrs. George's change in condition prevented them from diagnosing, treating and possibly saving her life, and that this failure therefore was a proximate cause of her worsened condition and ensuing death. [App.9]

This was exactly the position taken by plaintiff-respondent throughout trial and the appeals process, including briefs and argument. LDS Hospital plays a game of semantics with its position that the court of appeals decision focuses on standard of care, rather than the proximate cause. The emphasis placed by the court of appeals on the causation issue is patent, and turns on the grossly prejudicial instructions which had the effect of improperly directing a verdict for LDS Hospital on that issue.

A. GRANTING LDS HOSPITAL'S PETITION FOR WRIT OF CERTIORARI WOULD BE INAPPROPRIATE SINCE THE COURT OF APPEALS DID NOT REACH SEVERAL OF THE ISSUES RAISED BY PLAINTIFF-RESPONDENT.

Petitioner claims "there is no basis for a new trial", and asks this Court to grant Certiorari to "dispel the confusion" supposedly created by the decision of the court of appeals. [Brief of Petitioner at 20] As petitioner correctly states however, because the Court of Appeals reversed an remanded the case for a new trial based on plaintiff-respondent's primary argument [Brief of Petitioner at 6], it did not reach other less critical but equally reversible errors by the district court. [App.10] For that reason, granting certiorari would be improvident since numerous issues that were appealed remain unresolved. Far better, in terms of both fairness and judicial economy to have the case correctly re-tried. The unresolved errors include:

1. Plaintiff's claim of error that the Special Verdict form, provided over plaintiff-respondent's objections, completely eliminated any possibility for the jury to consider plaintiff's claim of very substantial injuries and damage which occurred *prior* to the death of Betty George.

2. The district court's failure to instruct the jury on plaintiff-respondent's "increased risk" or "lost chance" theories for recovery.

3. The rejection of plaintiff-respondent's well-supported position that, under the facts of this case, *no expert testimony* should have been necessary to establish causation against the hospital.

4. The district court's error in allowing the hospital's "experts" to testify at all, after having previously ruled that such testimony would not be permitted.

5. Plaintiff-respondent's claim of error that the testimony of the hospital's "experts" was completely speculative and without foundation.

6. Plaintiff-respondent's claim that the district court erred by failing to direct a verdict in favor of defendants, Dr. Lloyd and Dr. Lahey, after the close of the evidence.

7. Plaintiff-respondent's claim that the district court erred by refusing to allow plaintiff an opportunity for rebuttal after defendant's closing argument. [*See*, App.20-21, which is plaintiff-respondent's STATEMENT OF THE ISSUES, before the court of appeals.]

The first item on this list warrants further comment. Plaintiff-respondent introduced extensive unrebutted proof at trial that Betty George suffered incredible pain, mental and emotional anguish prior to her cardiac arrest on August 2, 1986. The jury had no difficulty with the abominable lack of care provided by the hospital staff, finding LDS Hospital 100% negligent. Plaintiff requested that the jury be allowed to

separately determine the damages suffered by Betty George personally, which go to the Estate under U.C.A. §78-11-12, from the legally distinct damages to her heirs under Utah's wrongful death statute. U.C.A. §78-11-7; *See*, Switzer v. Reynolds, 606 P.2d 244 (Utah 1980).

However, question #3 on the Special Verdict, directed the jury to answer no further questions if it answered "no" to the question of whether the hospital's negligence was a proximate cause of Betty George's death. [App.22-25] The Special verdict made it *impossible* for the jury to award damages for substantial pre-death injuries which had been conclusively proved.

Under these circumstances, any alteration of the order for a new trial would constitute a *de facto* decision on these other significant issues not directly decided by the court of appeals. Justice, fairness and substantial issues of judicial economy require that the petition for a writ of certiorari be denied.

POINT III: LDS HOSPITAL'S ARGUMENT ON THE LAW IS BOTH IMPROPER AND INCORRECT.

LDS Hospital apparently views a Petition for a Writ of Certiorari as an opportunity to re-argue its failed positions on appeal. Many issues are improperly raised, and may not be included as a basis for granting certiorari.

A. THE DETERMINATION OF WHETHER TO GRANT CERTIORARI MUST BE STRICTLY LIMITED TO THE ISSUES PRESENTED FOR REVIEW

Rule 49 of the Rules of the Utah Supreme Court, sets forth the requirements of a Petition for Writ of Certiorari. The rule provides, in relevant part:

> (a) **Contents.** The petition for a writ of certiorari shall contain, in the order here indicated:
>
> (4) The questions presented for review, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the questions should be short and concise and should not be argumentative or repetitious. General conclusory statements such as "the decision of the Court of Appeals is not supported by the law or facts," are not acceptable. *The statement of a question presented will be deemed to comprise every subsidiary question fairly included therein. Only the questions set forth in the petition or fairly included therein will be considered by the Court.* (emphasis added)

The questions presented for review by LDS Hospital were:

> 1. Whether the court of appeals correctly reversed the jury verdict of no causation on grounds unrelated to the verdict or the issues raised by the parties.
>
> 2 Whether the court of appeals correctly ruled that jury instructions 16a and 21a regarding proof of negligence and proximate cause misstate Utah law and require a new trial.

These clearly are "general conclusory statements" and an insufficient basis on which to grant the Petition for a Writ of Certiorari.

LDS Hospital also raised arguments in its Petition which are not fairly included in the general issues presented. For example, at pages 15-16 and 18 of the Petition, LDS Hospital complains that plaintiff-respondent's objections were not adequately preserved at trial. Since this question was not specifically set forth, and is not "fairly included" in the issues presented for review, it should not be considered as a basis for granting certiorari.

B. THE COURT OF APPEALS PROPERLY CONSIDERED INSTRUCTIONS 16a AND 21a AS A BASIS FOR REVERSAL.

LDS Hospital alleges that plaintiff-respondent's failure to object to instructions both given and refused should preclude the

Court of Appeal's reversal on that basis. The issue was fully briefed and argued. Plaintiff-respondent took the position under Rule 51, *Utah R.Civ.P*, that he was prevented by prejudicial judicial proceedings from making a timely objection on the record, and that, in any event, a review of the trial court's instructions was required "in the interests of justice." The Court of Appeals quite apparently agreed, and/or determined, in its discretion under Rule 51, to review the errors complained of.

Since Petitioner made no showing that the Court of Appeals abused its discretion in reviewing the erroneous jury instructions, that issue can not be the basis for granting certiorari.

C. LDS HOSPITAL MISSTATES THE LAW REGARDING PROOF OF CAUSATION.

1. In a Negligence Action Solely Against a Hospital Testimony from a Physician on Causation is Not Required.

LDS Hospital continues to insist in its Petition, that plaintiff-respondent could only prove causation through the testimony of a physician. That position was rejected throughout the trial by the district court, which specifically allowed plaintiff's nurse and respiratory therapist to testify as experts on causation. The very same issue was fully briefed and argued at length before the court of appeals which also ruled against the hospital in its well reasoned and legally supported decision.

The simple fact of the matter is that no Utah case has ever held, *in an action solely against a hospital and its staff*, that testimony from a physician is required to establish causation. Plaintiff-respondent's case (as opposed to LDS Hospital's defense), had nothing to do with medical diagnosis and treatment.

The case had nothing to do with *the scientific effect of medicine, the result of surgery, or whether the attending physician exercised ordinary care.* Fredrickson v. Maw, 119 Utah 385, 227 P.2d 772, 773 (1951); Brief of Petitioner at 13.

Plaintiff-respondent's duty in this case was to provide expert testimony on the standard of care and its breach, which he convincingly did. At that point, the issue of whether the hospital's negligence resulting in a complete failure to provide necessary care was a contributing cause, or a substantial factor in the patient's subsequent arrest and death, should have been one of *fact* for the jury. [fn2]

The court of appeals agreed with numerous courts from other jurisdictions which had considered that specific issue and found that physician testimony was not a necessary requirement to establish causation. *See, e.g.*, cases cited with approval by the Utah Court of Appeals in George v. LDS Hospital [App.7-8], including: Utter v. United Hospital Center, 236 S.E.2d 213, 216 (W.Va. 1977); Campbell v. Pitt County Memorial Hospital, 352 S.E.2d 902, 908-09 (N.C.App. 1987); Karrigan v. Nazareth Covenant & Academy, 510 P.2d 190, 196 (Kan. 1973); Darling v. Charleston Community Hospital, 33 Ill.2d 326, 211 N.E.2d 253, 258 (Ill. 1965); Goff v. Doctor's General Hospital, 333 P.2d 29, 33 (Cal.App, 1958), and see generally, Morris, *The Negligent Nurse*, 33 Baylor L.Rev. 109 (1981). Appellant's Opening Brief, and Reply Brief before the court of appeals contain detailed discussions of many other cases and authorities to the same effect.

[fn2] This Court need not dwell on this issue, since the court of appeals found that plaintiff-appellant had produced sufficient, competent expert testimony on causation. [App.6-7]

Regardless of whether this point may be legitimately disputed, it is nevertheless prejudicial, reversible error for the district court to have conducted the trial under rules prohibiting the plaintiff-respondent from attempting to prove causation through a physician, and subsequently instructing the jury that plaintiff-respondent's burden *required* proof of causation through a physician. Fundamental fairness and the interests of justice require that plaintiff-respondent be awarded a new trial, and the petition for a writ of certiorari be denied.

2. Plaintiff-Respondent was Entitled to have the Jury Instructed on His "Lost Chance of Survival" Theory.

The court of appeals correctly held that if the negligence of the hospital prevented Betty George's doctors from diagnosing and treating her condition, the jury could have found that failure to be "a proximate cause of her worsened condition and ensuing death." [App.9] Here again, the court of appeals decision was supported by well reasoned, *relevant* decisions from other jurisdictions. [App.8-9] The law continues to trend in a direction favoring "lost chance" causes of action, with logical and fair reasoning.

In Ehlinger v. Sipes, 155 Wis.2d 1, 454 N.W.2d 754 (1990), plaintiffs claimed a physician's negligent failure to diagnose the existence of twins resulted in their injuries at birth. Plaintiff's expert at trial stated that, had the existence of twins been discovered, certain measures would have given the mother a chance of prolonging her pregnancy, which *may* have prevented the subsequent injuries. At the close of the evidence, the physician was granted a directed verdict on causation which

was affirmed by the Wisconsin Circuit Court. The Wisconsin Supreme Court reversed and remanded the case for a new trial, based, in part, on the application of Restatement (Second) of Torts, §323 (1965). The Utah Court of Appeals used the same rationale in George v. LDS Hospital. [App.8-9, fn.5] The Wisconsin Court's reasoning, equally applicable here included

> We disagree that to establish causation the Ehlingers must show that proper diagnosis and treatment *would* have been successful. We conclude that in a case of this nature, where the causal relationship between the defendant's alleged negligence and the plaintiff's harm can only be inferred by surmising as to what the plaintiff's condition would have been had the defendant exercised ordinary care, to satisfy his or her burden on causation, the plaintiff need only show that the omitted treatment was intended to prevent the very type of harm which resulted, that the plaintiff would have submitted to the treatment, and that it is more probable than not the treatment *could* have lessened or avoided the plaintiff's injury had it been rendered.
>
> Causation is a question of fact. (*Id.* at 759, emphasis in the original)

The Ehlinger court continued,

> In a case such as presented here, where given the nature of the malady and omitted treatment the success of the treatment if instituted is not a matter of reasonable certainty, we refuse to place upon the injured plaintiff the burden of proving what more probably than not *would* have happened had the defendant not been negligent.
>
> Greater uncertainty would be involved if an expert were required to testify as to what more probably than not would have happened had the defendant rendered appropriate care. (*Id.* at 761)

Recall that one of the plaintiff-respondent's objections in this case, not reached by the Court of Appeals, was that the testimony of the hospital's "experts" on causation was completely speculative and without foundation.

See also, Aasheim v. Humberger, 695 P.2d 824, 828 (Mont. 1985), which held,

> We feel that including "loss of chance" within causality recognizes the realities inherent in medical negligence litigation. People who seek medical treatment are diseased or injured. Failure to diagnose or properly treat denies the opportunity to recover. Including this lost opportunity within the causality embrace gives recognition to a real loss consequence of medical failure.

In this case, LDS Hospital's negligence deprived Betty George of *any effective treatment.* Depriving plaintiff-respondent of a lost chance theory of recovery, would be tantamount to a grant of immunity for the hospital's negligence, unless the George family could produce speculative testimony regarding what the result would have been *had that negligence not occurred.* Such a burden plainly would require proof of the unknowable. The Utah Court of Appeals was similarly troubled by the defense asserted by LDS Hospital that, "our negligence made no difference." The court stated:

> Such an argument is problematic. It would be unacceptable, for obvious policy reasons, to permit hospitals or doctors to escape responsibility for the negligent treatment of gravely ill persons upon a showing that the patient's condition was terminal and he or she was going to die anyway. [App.7, fn.4]

It is often said that the hospital staff are "the eyes and ears" of the treating physicians. The hospital staff is undoubtedly a necessary and vital link between a sick patient and her opportunity to receive necessary diagnosis and treatment. LDS Hospital undertook to perform services for Betty George, who, in turn, agreed to pay for them. Thereafter, Betty George had a right to expect that the hospital would exercise reasonable care

on her behalf regardless of the likelihood of benefit to be derived. LDS Hospital now takes the position that it should be liable only for omissions which, if undertaken, would have had a greater than 50% chance of success. Such a position, if endorsed by the courts of this state, would declare open season on seriously ill patients, since doctors and hospitals would be free of liability for the grossest malpractice on the rather hypocritical assertion that nothing they could have done would have made a difference.

Patients like Betty George go to hospitals not only to prevent death, but also to avoid or lessen the suffering associated with injury or disease. A jury should be allowed to decide whether a failure of a hospital to procure obviously necessary medical assistance, was a substantial factor in causing subsequent injuries which appropriate medical treatment *could* have prevented or ameliorated. The inclusion of that principle by the court of appeals in this case, is amply supported both in logic and law. [App.7-9]

CONCLUSION

In George v. LDS Hospital, 142 U.A.R. 27 (Utah App. 1990), a routine negligence case against a hospital, the court of appeals correctly perceived the issues, reversed, and remanded the case for a new trial based on

1. The trial court's failure to instruct the jury on plaintiff-respondent's theory of the case, which was well supported by evidence and competent expert testimony; and

2. Extremely prejudicial errors in instructing the jury on plaintiff-respondent's burden of proof regarding causation,

which differed materially from the burden plaintiff-respondent had been held to throughout the trial.

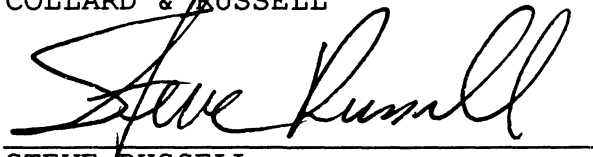
Since the court remanded the case for a new trial, it did not reach several other reversible errors which were committed by the trial court.

In its Petition for a Writ of Certiorari, LDS Hospital raises legal issues not material to the court of appeal's decision, and which even if correct, would not effect the propriety of the remand. Regardless, LDS Hospital is also incorrect on the law. Plaintiff-respondent's negligence action against LDS Hospital did not require expert physician testimony on causation. Further, the case is a classic example of one which should have been submitted to the jury on a "lost chance" theory for recovery. The decision of the Utah Court of Appeals renders justice, and has ample support both in logic and the law.

WHEREFORE, plaintiff-respondent David George respectfully request that the Petition for Writ of Certiorari by LDS Hospital be DENIED.

RESPECTFULLY SUBMITTED this 29th day of November, 1990.

COLLARD & RUSSELL



STEVE RUSSELL

Attorney for Plaintiff-Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of November, 1990, four true and correct copies of the foregoing RESPONDENT'S MEMORANDUM IN OPPOSITION TO LDS HOSPITAL'S PETITION FOR WRIT OF CERTIORARI were deposited in the U.S. Mail, postage prepaid to the following:

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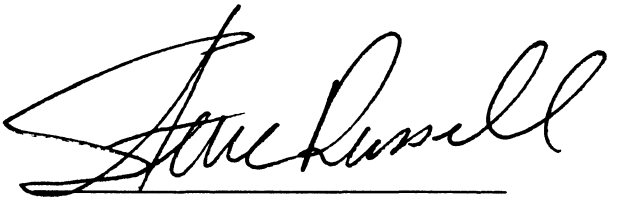

PLAINTIFF-RESPONDENT'S APPENDIX

IN THE UTAH COURT OF APPEALS

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David George, individually, and as personal representative of the heirs of Betty George, deceased,	)	
Plaintiff and Appellant,	)	OPINION (For Publication)
v.	)	
LDS Hospital, et al.,	)	Case No. 890381-CA
Defendants and Appellees.	)	

Third District, Salt Lake County
The Honorable Pat B. Brian

Attorneys: Steve Russell and Kathryn P. Collard, Salt Lake City, for Appellant
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J. Anthony Eyre and Michael F. Skolnick, Salt Lake City, for Michael Lahey, M.D.

Before Judges Bench, Davidson, and Orme.

DAVIDSON, Judge:

Plaintiffs, the husband and heirs of decedent Betty George, sought recovery in a wrongful death action against LDS Hospital, Dr. Kimball Lloyd, and Dr. Michael Lahey. Plaintiffs appeal from a jury verdict finding that defendant LDS Hospital was negligent in its care of Mrs. George, but that defendant's negligence was not a proximate cause of Mrs. George's death. Dr. Lloyd and Dr. Lahey reached a settlement with the plaintiffs prior to trial, although the doctors remained in the case for purposes of determining comparative negligence. The jury concluded that the doctors were not negligent and assigned 100 percent responsibility to the hospital.

Plaintiffs' motion for a new trial was denied by the trial court. On appeal, plaintiffs claim that the trial court committed reversible error in the jury instructions. We reverse and remand for a new trial.

FACTS

On July 28, 1986, Dr. Lloyd admitted Mrs. George to LDS Hospital for a hysterectomy and exploratory surgery. The surgery was performed on July 29 without apparent complications. On the morning of July 30, Dr. Lloyd ordered that Mrs. George be ambulated four times daily, that she receive incentive spirometry[1] every hour while awake, and that the nurses instruct her to cough and breathe deeply. This treatment was intended to increase Mrs. George's breath capacity, which is typically depressed following a patient's abdominal surgery.

Mrs. George's breathing deteriorated during July 31. On the morning of August 1, Dr. Lloyd ordered that a chest X-ray and lung profusion scan be taken to determine whether Mrs. George had a pulmonary embolism. Although these tests proved negative for a pulmonary embolism, they did indicate the possibility of bilateral atelectasis.[2] In the early afternoon of August 1, Dr. Lloyd called in Dr. Lahey and the hospital's respiratory therapy department to assist him in resolving Mrs. George's pulmonary condition.

Dr. Lloyd ordered that Mrs. George undergo an angiogram in a further attempt to determine whether she had a pulmonary embolism. Mrs. George was taken to the intensive care unit (ICU) for an angiogram at 10:20 a.m. on August 2. The angiogram was completed at about 1:00 p.m., at which time Dr. Lloyd learned that the test result for a pulmonary embolism was negative.

A nurse found that Mrs. George was having difficulty breathing, and that Mrs. George was incoherent upon returning

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1. An incentive spirometer measures the volume of air entering and leaving the lungs. Use of the device expands a patient's diaphragm, while also providing an incentive for a patient to breathe more deeply.

2. Atelectasis is the collapse of an expanded lung, resulting in an insufficient flow of air to the lung's air sacs.

from ICU at 2:20 p.m. She did not inform Dr. Lloyd of this condition. The charge nurse telephoned Dr. Lloyd at about 3:00 p.m. to inform him that Mrs. George had returned to OB/GYN from ICU, but she also failed to notify Dr. Lloyd of Mrs. George's deteriorating physical and mental condition.

At 3:00 p.m., another nurse took over the care of Mrs. George. This nurse was a one-to-one special-duty nurse, whose only assignment was to monitor Mrs. George's condition. At about 3:30 p.m., a written notation was made in the chart that Mrs. George was disoriented and incoherent. A second-year resident physician was unable at this time to determine Mrs. George's blood pressure and the nurses had difficulty making Mrs. George bleed for a glucose test. Neither Dr. Lloyd nor Dr. Lahey were informed of these adverse changes in Mrs. George's condition.

At about 4:00 p.m., the resident physician telephoned Dr. Lloyd to tell him that Mrs. George was febrile. Dr. Lloyd was not informed during this conversation that Mrs. George exhibited symptoms of hypoxia and he did not receive further reports until being told of Mrs. George's cardiac arrest. Dr. Lahey did not receive any further medical reports until 7:00 p.m., at which time he also was told that Mrs. George had suffered a cardiac arrest.

The record indicates that the resident physician did not visit Mrs. George between 5:00 p.m. and 7:00 p.m. The record also shows that the special-duty nurse failed to continuously monitor Mrs. George and to notify a supervisor of Mrs. George's respiratory distress. Furthermore, the special-duty nurse was not even in the room when Mrs. George stopped breathing and suffered her first cardiac arrest.

Mrs. George stopped breathing in front of her visiting daughter at about 7:00 p.m. The daughter then had to run out of the hospital room in search of a nurse. A code was called at 7:04 p.m., in which cardiopulmonary resuscitation was sought for Mrs. George. Breathing assistance for Mrs. George was initiated at about 7:13 p.m. During the interval between the cessation of breathing and breathing assistance being initiated, Mrs. George suffered a lack of oxygen to her brain. Although her heart beat was reestablished, Mrs. George was comatose after the cardiac arrest. Two days later, Mrs. George died following a second cardiac arrest.

JURY INSTRUCTIONS

Two of the trial court's jury instructions are at issue in this action. The court's Jury Instruction #16A provided:

> The plaintiff in this case cannot recover against the doctors or the hospital unless it is proven, that,
>
> 1. Dr. Kimball Lloyd, Dr. Michael Lahey or LDS Hospital's nursing staff or respiratory therapist or all of them, based on a degree of reasonable medical probability, failed to exercise that degree of reasonable care and skill in caring for the plaintiff that was ordinarily possessed and used by others in the respective profession practicing in 1986 in Salt Lake City, Utah, or similar communities under similar circumstances;
>
> 2. Based on a degree of reasonable medical probability established through expert medical testimony from a duly qualified medical doctor, that such failure, if any, was the proximate cause of the death of Betty George; and
>
> 3. That David George personally, and the heirs of Betty George, and the representative of the estate of Betty George, was damaged by the negligence, if any, of one of the defendants or all of them.
>
> If you do not find, by a preponderance of the evidence, all of the foregoing propositions with regard to either Dr. Kimball Lloyd, Dr. Michael Lahey or LDS Hospital, the party or parties, as the case may be, against whom any one proposition is not found cannot be found to have committed medical malpractice and your verdict must be in favor of the defendant or defendants. If you find that the evidence is evenly balanced on any of the above-mentioned issues, then your

> verdict should be for the defendant or defendants on whose behalf the evidence is evenly balanced.

The court's Jury Instruction #21A provided:

> You are instructed that where the proximate cause of Betty George's death and therefore the injury or loss claimed by plaintiff is not established by a preponderance of the evidence based on reasonable medical probability from testimony of a medical doctor, but is left to conjecture or speculation and may be reasonably attributed to causes over which the hospital or doctor had no control or responsibility, then the plaintiff has failed to sustain the burden of proof as to proximate causation.

The jury returned a special verdict finding LDS Hospital negligent in its care of Mrs. George, but not finding that the negligence was a proximate cause of Mrs. George's death. Plaintiffs claim on appeal that jury instructions #16A and #21A prevented the jury from meaningfully considering the testimony of plaintiffs' expert witnesses. Plaintiffs also claim that jury instructions #16A and #21A precluded the jury from awarding damages where the hospital's negligence was only a contributing proximate cause of Mrs. George's death.

EXPERT WITNESSES

The trial court admitted the testimony of plaintiffs' expert witnesses, respiratory therapist Donald Owings and nurse Harriett Gillerman, to explain the hospital's duty to Mrs. George and the hospital's breach of this duty. Owings testified that a respiratory therapist has a duty to notify a physician or other supervisor if a patient does not respond to respiratory therapy. Based on Mrs. George's failure to respond to the prescribed respiratory therapy, Owings offered his expert opinion that the hospital's respiratory therapist breached his duty by failing to notify the proper persons of Mrs. George's deteriorating pulmonary condition.

Nurse Gillerman testified that ambulation and incentive spirometry are used to prevent and treat atelectasis.

Gillerman offered her expert opinion that the nurses, in failing to follow physician's orders to have Mrs. George ambulated and to use incentive spirometry on August 1, thereby breached their duty to her. Gillerman also testified that the nurses breached their duty by failing to perform a neurological assessment of Mrs. George when Mrs. George showed discernible signs of respiratory distress or hypoxia and by failing to timely notify the doctors of her rapidly deteriorating condition.

Defendant counters that an expert witness cannot testify about an area of medicine in which he or she is not personally familiar. The record clearly indicates, however, that Gillerman and Owings testified only to the standards of care in their respective fields. The trial court recognized these witnesses as experts and admitted their testimony, yet the court, through the jury instructions, prevented the jury from considering their testimony.[3]

The Utah Supreme Court has stated that "[a]n appeal challenging the refusal to give jury instructions presents questions of law only. Therefore, we grant no particular deference to the trial court's rulings." Ramon By And Through Ramon v. Farr, 770 P.2d 131, 133 (Utah 1989). The parties in this case dispute the trial court's conclusions of law as stated in the jury instructions.

This court has stated that "[i]n medical malpractice actions the plaintiff must provide expert testimony to establish: 1) the standard of care, 2) defendant's failure to comply with that standard, and 3) that defendant caused plaintiff's injuries." Hoopiiaina v. Intermountain Health Care, 740 P.2d 270, 271 (Utah Ct. App. 1987) (citations omitted); see Nixdorf v. Hicken, 612 P.2d 348, 351 (Utah 1980). Plaintiff's experts testified as to the hospital's standard of care, the hospital's failure through its employees to meet this standard, and Mrs. George's subsequent cardiac arrest.

Courts have recognized that "[n]urses are specialists in hospital care who, in the final analysis, hold the well-being,

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3. This error was compounded by the court consistently stating throughout trial that cause of death was not an issue in the case and that expert testimony need not address that subject, only to then give a jury instruction focusing on causation as established by medical testimony.

in fact in some instances, the very lives of patients in their hands." Utter v. United Hosp. Center, Inc., 236 S.E.2d 213, 216 (W.Va. App. 1977), reh'g denied (1977) (negligent failure of nurses to observe plaintiff's condition). Courts have also recognized that a nurse may have a duty to notify her supervisor that a life-threatening situation exists and that failure to perform this duty may be a proximate cause of plaintiff's additional injury. See Campbell v. Pitt County Memorial Hosp. Inc., 352 S.E.2d 902, 908-9 (N.C. App. 1987).

The jury must be allowed to decide whether the hospital's failure to notify the doctors of Mrs. George's change in medical status, which may have indicated either hypoxia or sepsis, was a breach of the duty owed to Mrs. George. The trial court erred in not allowing the jury to base its decision on the plaintiffs' expert testimony. See Karrigan v. Nazareth Convent & Academy, Inc., 510 P.2d 190, 196 (Kan. 1973), reh'g denied (1973) (nurses' delay in notifying physician of plaintiff's condition); see also Darling v. Charleston Community Memorial Hosp., 211 N.E.2d 253, 258 (Ill. 1965), reh'g denied (1965) (nurses failed to recognize and inform physician of change in patient's condition, where the condition became irreversible within a matter of hours).

PROXIMATE CAUSE

According to the hospital pathologist, the combination of atelectasis, pulmonary embolism, and sepsis probably led to hypoxia and this, in turn, resulted in Mrs. George's first cardiac arrest and subsequent death. Both parties agreed that hypoxia and sepsis were significant contributing causes of Mrs. George's death. Plaintiffs' and defendant's expert witnesses also agreed that sepsis and pulmonary embolism produce similar symptoms.

Defendant argues that Mrs. George would inevitably have died of sepsis after 2:20 p.m. on August 2, that her septic condition was not caused by negligence, and that any negligence on the hospital's part was therefore not a proximate cause of Mrs. George's death.[4] The medical record shows that sepsis

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4. Such an argument is problematic. It would be unacceptable, for obvious policy reasons, to permit hospitals or doctors to escape responsibility for the negligent treatment of gravely ill persons upon a showing that the patient's condition was terminal and he or she was going to die anyway.

was not diagnosed until August 3, the day after Mrs. George's first cardiac arrest. Plaintiffs assert that the hospital's negligent failure to notify Dr. Lloyd or Dr. Lahey of Mrs. George's deteriorating condition at a minimum contributed to her continued deterioration and may have hastened her death by depriving her of the chance to receive earlier diagnosis and treatment.

Although defendant asserts that Mrs. George's death due to sepsis was inevitable, defendant's expert witness, Dr. Charles Elliot, testified under cross-examination that sepsis may be reversible. Dr. Lewis Weinstein, another of defendant's expert witnesses, testified under cross-examination that sepsis may be treatable, that sepsis did not occur instantaneously in Mrs. George's case, and that prompt treatment of sepsis may facilitate a patient's recovery. The record therefore does support plaintiff's argument that the nurses' failure to notify Dr. Lloyd or Dr. Lahey of Mrs. George's deteriorating condition may well have prevented the doctors from timely diagnosing and treating her.

"[E]vidence which shows to a reasonable certainty that negligent delay in diagnosis or treatment increased the need for or lessened the effectiveness of treatment is sufficient to establish proximate cause." James v. United States, 483 F. Supp. 581, 585 (N.D. Ca. 1980). Another court found the defendant's assertion that operating upon the patient in a timely manner would not have increased her chance of survival unsupported by the record. See Hicks v. United States, 368 F.2d 626, 632 (4th Cir. 1966). The Hicks court concluded that defendant's "negligence nullified whatever chance of recovery she might have had and was the proximate cause of the death." Id. at 633.

In a case where the chances of saving a patient's life would have been increased if a physician had been timely notified of the patient's condition, a court found that whether the nonfeasance of the nurses was a contributing proximate cause of death was a question of fact. See Goff v. Doctors General Hosp. of San Jose, 333 P.2d 29, 33 (Cal. Dist. Ct. App. 1958). The Pennsylvania Supreme Court found error in a trial court's jury instructions because of "the unmistakable implication in this passage that defendant's negligence had to be the sole cause of death in order to bring liability to the defendant when, in fact, liability could attach if the negligence of the defendant were but a substantial factor in bringing about the death." Hamil v. Bashline, 392 A.2d 1280,

1289 (Pa. 1978) reh'g denied (1978)(original emphasis). Hamil relied on the Restatement (Second) of Torts § 323(a)(1965)[5] as authority for the proposition that liability may be found where negligence increases a party's risk of harm.

A jury could have reasonably concluded that the failure of the nurses to notify Dr. Lloyd or Dr. Lahey of Mrs. George's change in condition prevented them from diagnosing, treating, and possibly saving her life and that this failure therefore was a proximate cause of her worsened condition and ensuing death. See Morris, The Negligent Nurse -- The Physician and the Hospital, 33 Baylor L.R. 109, 116 (1981) (the significance of proximate cause as applied to a nurse's negligence). The trial court's jury instructions therefore improperly implied that the jury could find only one proximate cause of Mrs. George's death.

Based upon the errors arising from the improper jury instructions, we reverse and remand for a new trial against defendant LDS Hospital. The verdict of no cause of action against the defendant doctors is affirmed.

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5. Restatement (Second) of Torts § 323(1965) provides that:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm . . . .

Because we remand for new trial, it is unnecessary to reach the other issues raised by appellant.

Richard C. Davidson, Judge

WE CONCUR:

Russell W. Bench, Judge

Gregory K. Orme, Judge

ADDENDUM II

The following portions of the record support appellant's position that the trial court repeatedly ruled that *proof of the medical cause of death* (as opposed to proof that the *conduct of the hospital staff* contributed to the cause of the patient's *initial cardiac arrest* on August 2, 1986) was not at issue or irrelevant. This section also demonstrates how the trial court violated its own ruling. After specifically instructing appellants' counsel not to ask his experts their opinion on cause of death, the Court later allowed respondent's experts, who were not involved with Mrs. George's care or the determination of her cause of death, to testify on that subject. The narrow medical cause of death, separate and apart from the conduct of the hospital staff as a contributing cause, became, in fact, the focus of respondent's defense.

R-765 at 323-25: (Testimony of appellant's expert Don Owings.)

> Q. [Russell] Have you reviewed the autopsy report that is included in the medical record in front of you, pages 3-10?
>
> A. [Owings] Yes.
>
> Q. Does that report contain any evidence that the patient was indeed deprived of oxygen to the brain?
>
> Mr. Burbidge: Objection, your Honor. The document speaks for itself.
>
> The Court: It is in evidence isn't it?
>
> Mr. Russell: No. Mr. Burbidge --
>
> The Court: The objection is sustained.
>
> Q. Have you, in formulating the opinion that you just gave us -- that is, that the ventilatory assistance, the lack of ventilatory assistance contributed to the coma and death-- did you rely in part on the autopsy?
>
> A. Yes.

Q. What in that autopsy supports your opinion?

Mr. Burbidge: Objection, again, hearsay.

The Court: Sustained.

Mr. Russell: Your honor, an autopsy --

The Court: Would you like to approach the bench?

(An off-the-record discussion at the bench.)

The Court: The objection is sustained.

Q. Mr. Owings, would you look at page 80 of the medical record, which is Plaintiff's Exhibit No. 1.

A. Okay.

Q. Those records are blood gas reports?

A. Yes, sir.

Q. Do you see the report at 7:12, at the bottom of the page?

A. It says 1912.

Q. That's 7:12

A. Right.

Q. That would be during the code procedure?

A. According to the record, yes.

Q. What does that indicate about whether or not the patient was receiving oxygen?

Mr. Burbidge: Objection, foundation.

The Court: Overruled.

A. It indicates that the patient is not ventilating, and that their oxygen is below normal values, severely hypoxic.

Q. Is that proof, in your opinion, that lack of oxygen caused Mrs. George's arrest and death?

A. Yes.

Mr. Burbidge: Objection, your Honor, competency and foundation.

The Court: Sustained. Is there a motion to strike?

Mr. Burbidge: Yes, your Honor.

The Court: Granted.

Mr. Burbidge: If we please the Court, could we have the witness wait until an objection is entered, before the response comes back?

The Court: The Court is going to take a five minute recess. The Court will see counsel in chambers, on the record.

(The following proceedings occurred in chambers.)

The Court: The record will reflect that counsel and the Court are in session, out of the presence of the jury. **For the record, the Court has previously ruled that the cause of death may not be testified to except for someone who in and official capacity participated in determination of cause of death. You may proceed.**

R-765 at 327

The Court: Is Counsel suggesting, by virtue of that argument, that if cause of death becomes an issue, one who signs a death certificate is competent to testify as to cause of death?

Mr. Russell: Not necessarily, your Honor. I think there would be a lot of circumstances where the person who signs the certificate doesn't know. Was just told, wrote it down and signed it.

The Court: That's the Court's precise observation.

Mr. Russell: The way I understand it, the Court is requiring us to bring such a person in here to testify about it. Mr. Owings, by his training and experience, can look at the record, can look at the autopsy, and he knows -- he can form an opinion that lack of oxygen was the cause of death.

The Court: **Not the cause of death.** He had already testified, and the Court has listened carefully to the framing of the question and to the responsive answer. **The question was, did it contribute? The answer was, in his opinion, it did contribute. There is nothing wrong with the question nor the answer.** The last question posed to the witness was, in your opinion, did it cause the decedent's death? It is an inappropriate question, and the Court has previously ruled on it. That's the reason the Court sustained the objection and granted the motion to strike.

R-765 at 328-331 - Conference in Chambers:

The Court: **The Court is not suggesting that, A, cause of death is an issue in this case. The Court has never taken that position.** But if you contend that it is an issue, . . .

Mr. Russell: I don't think it is.

The Court: **I don't think it is, either. I don't think it is an issue . . . *as opposed to a contributing cause*.**

Mr. Burbidge: May I be heard on the matter, your Honor?

The Court: As opposed to a contributing cause.

Ms. Collard: We are talking about the cause as opposed to a contributing cause?

The Court: The Court has permitted counsel to ask that question.

Mr. Russell: My concern is that when we get done with our evidence, defense counsel is going to jump up and move for a directed verdict because nobody has said that anything that someone did caused or contributed to the cause of death. We have that now through Mr. Owings and we will have it through Nurse Gillerman. To tell you the truth, I an just unsure in these discussion we have about whether the Court is saying, in order to -- because **we do have the burden to prove that, that violations of the standard of care contributed to the cause.**

The Court: The record is replete at this point with both of your expert witnesses on that.

Mr. Russell: I want to make sure that --

The Court: Isn't it?

Mr. Russell: I think so.

The Court: The Court is not suggesting to either Counsel how they proceed with their case in chief or their defense or rebuttal. **The Court is suggesting, in its own opinion, the cause of death is not an issue.** You have talked all along in this case about standard of care, and that's the basis that these two experts you have called from Southern California have been designated or acknowledged by the Court as experts. They are dealing with the standard of care. **And they are perfectly within their right as an expert witness to say if the**

standard of care in not adhered to, I would expect as an expert, that this is what would occur. But they can't say with specificity that that's in fact what did happen to this particular woman.

Mr. Burbidge: May I be heard, please, your Honor?

The Court: Yes.

Mr. Burbidge: **I would move for a mistrial at this time, and the basis of the motion is that prejudicial testimony, incompetent testimony, and testimony without foundation has come in with regard to the cause of death and the contributing causes of death.** In the State of Utah, medical doctors are restricted -- such issues are restricted to the testimony of medical doctors. They are the only authority to treat and to diagnose. And the diagnostic function of a medical doctor is the exclusive -- or the determination of cause of death or contributing cause of death is in the exclusive province, pursuant to statute and case law, of medical doctors. And the Court's ruling, allowing these unqualified experts to testify as to a contributing cause of death, is a prejudicial error that cannot be corrected through any kind of instruction to this jury, and I would move for a mistrial at this time, and request the Court give direction to counsel for the plaintiff that he is not to pursue that line of questioning with these witnesses again.

The Court: **The motion for mistrial is denied. The Court has previously ruled that this witness nor any other expert witness who was not involved in determination of cause of death could not so testify.** And the Court has granted defense counsel's motion to strike. Further, if there is a problem, and should cause of death become an issue in this case, the Court is of the opinion that the error made, if in fact it occurred, is not prejudicial, and is curable.

Anything further?

Mr. Russell: No, your honor, thank you.

The Court: **The Court will, on the record instruct counsel not to ask this witness nor any other expert witness as to the decedent's cause of death, who did not participate in making that determination,** so that there is no misunderstanding on that part. And the Court has stated previously, on the record, out of the presence of the jury, that that's the Court's position, and so instructs counsel for the plaintiff again.

NOTE: Following the repeated assertions of this position, the Court subsequently allowed Dr. Trowbridge, Dr. Weinstein and Dr. Elliot - none of whom had provided any care to the patient, nor did they have any involvement with the determination on cause of death - to offer their purely speculative opinions on that very subject. Worse, in instructions 16A, 21A and the Special Verdict Form, the Court required plaintiff to *prove the cause of death through a physician* or recover nothing.

INSTRUCTION NO. 16a

The plaintiff in this case cannot recover against the doctors or the hospital unless it is proven, that,

1. Dr. Kimball Lloyd, Dr. Michael Lahey or LDS Hospital's nursing staff or respiratory therapist or all of them, based on a degree of reasonable medical probability, failed to exercise that degree of reasonable care and skill in caring for the plaintiff that was ordinarily possessed and used by others in the respective profession practicing in 1986 in Salt Lake City, Utah, or similar communities under similar circumstances;

2. Based on a degree of reasonable medical probability established through expert medical testimony from a duly qualified medical doctor, that such failure, if any, was the proximate cause of the death of Betty George; and

3. That David George personally, and the heirs of Betty George, and the representative of the estate of Betty George, was damaged by the negligence, if any, of one of the defendants or all of them.

If you do not find, by a preponderance of the evidence, all of the foregoing propositions with regard to either Dr. Kimball Lloyd, Dr. Michael Lahey or LDS Hospital, the party or parties, as the case may be, against whom any one proposition is not found cannot be found to have committed medical malpractice and your verdict must be in favor of that defendant or

defendants. If you find that the evidence is evenly balanced on any of the above-mentioned issues, then your verdict should be for the defendant or defendants on whose behalf the evidence is evenly balanced.

INSTRUCTION NO. 21a

You are instructed that where the proximate cause of Betty George's death and therefore the injury or loss claimed by plaintiff is not established by a preponderance of the evidence based on reasonable medical probability from testimony of a medical doctor, but is left to conjecture or speculation and may be reasonably attributed to causes over which the hospital or doctor had no control or responsibility, then the plaintiff has failed to sustain the burden of proof as to proximate causation.

STATEMENT OF THE ISSUES

1. Where the evidence demonstrated that the hospital staff failed to alert physicians to changes in the medical condition of Betty George requiring immediate medical diagnosis and treatment, did the trial court commit reversible error by requiring appellant to produce expert testimony as to causation? Stated another way, was this not a case "obvious to laymen", in which the jury could have found negligence and causation without the necessity of expert testimony?

2. In a case alleging negligence against LDS Hospital, did the trial court commit reversible error by instructing the jury that proof of causation could only come from expert physicians, as opposed to nursing and respiratory therapy experts?

3. Did the trial court commit reversible error by failing or refusing to submit to the jury, appellant's proposed instructions which set forth his theory of the case, which was supported by competent evidence?

4. Did the trial court commit reversible error by inserting the previously rejected instructions 16A and 21A into the final set of instructions on the last day of trial, after both sides had rested, immediately before closing argument?

5. Did the trial court commit reversible error by overruling appellant's objections that LDS Hospital's physician expert's testimony as to causation was speculative, and without foundation? In the same respect, did the trial court commit reversible error when it violated its own specific ruling, and allowing the respondent's experts to testify as to cause of death.

6. Did the trial court commit reversible error by denying appellant's Motion for a Directed Verdict as to Dr. Lloyd and Dr. Lahey?

7. Did the Special verdict form, submitted to the jury over appellant's objections, constitute reversible error?

8. Did the trial court's denial of appellant's right to present rebuttal argument constitute prejudicial error?

9. Did the trial court commit reversible error when it denied appellant's motion for a new trial?

10. Was it error for the trial court to award respondent costs associated with the taking of depositions pursuant to Rule 54(d), Utah Rules Of Civil Procedure?

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY

STATE OF UTAH

DAVID GEORGE, et al. Plaintiff, vs. KIMBALL LLOYD, M.D., MICHAEL LAHEY, M.D., and INTERMOUNTAIN HEALTH CARE, dba LDS HOSPITAL Defendant.	:	SPECIAL VERDICT Civil No. C-87-4199 Judge Pat Brian

At the end of each proposition submitted to you, indicate your finding by placing an "X" in the appropriate line. If there is preponderance of the evidence in favor of the proposition, indicate by finding "yes." If there is preponderance of the evidence against the proposition, indicate by finding "no." If there is no preponderance of the evidence either way on the proposition, indicate by answering "no."

We, the jury in this action, find the answers to the questions propounded to us, as follows:

QUESTION NO. 1

A. Was Dr. Kimball Lloyd negligent in his care of Betty George?

ANSWER: Yes_____ No X

B. If you answered "yes" to question No. 3A above, then and only then answer the following question: Was the negligence of Dr. Kimball Lloyd a proximate cause of the death of Betty George and the damages claimed by David George and the heirs of Betty George?

ANSWER: Yes_____ No_____

QUESTION NO. 2

A. Was Dr. Michael Lahey negligent in his care of Betty George?

ANSWER: Yes_____ No X

B. If you answered "yes" to question No. 2A above, then and only then answer the following question: Was the negligence of Dr. Michael Lahey a proximate cause of the death of Betty George and the damages claimed by David George and the heirs of Betty George?

ANSWER: Yes_____ No_____

QUESTION NO. 3

A. Was LDS Hospital through its nursing staff and/or respiratory therapists negligent in their care of Betty George?

ANSWER: Yes X No_____

B. If you answered "yes" to No. 3A above, then answer the following question: Was the negligence of LDS Hospital including the nursing staff and/or the respiratory therapists, a

proximate cause of the death of Betty George and the damages claimed by David George and the heirs of Betty George?

ANSWER: Yes____ No X

If you answered "no" to question 3A or 3B, or if you found no preponderance of the evidence either way, then answer no further questions.

QUESTION NO. 4

What is the amount of damages, if any, sustained by David George, and the heirs of Betty George and the estate of Betty George? This question should be answered only if you answered "yes" to question No. 3A and 3B.

General Damages

a. Loss of consortium $_____

b. Pain and suffering of Betty George $_____

Special Damages including:

a. Funeral and Burial expenses $_____

b. Medical expenses $_____

c. Lost income, benefits and household services $_____

QUESTION NO. 5

Assessing a percentage only to a party or parties found negligent, considering the negligence to amount to 100 percent, what percentage of negligence is attributed to:

a. Dr. Kimball Lloyd _____%

b. Dr. Michael Lahey _____%

c. LDS Hospital, its nurses and/or respiratory therapists _____%

Total 100 %

Dated this 9th day of November, 1988.

Ralph F. Smith

JURY FOREPERSON

fully tried and resulted in a verdict and judgment for the defendant, the court's later ruling granting defendant's motion to dismiss was a nullity and the plaintiff could not appeal therefrom but should base any appeal upon the verdict and judgment and the rulings refusing to vacate them. Roche v Zee, 1 Utah 2d 193, 264 P.2d 855 (1953).

—Splitting of negligence and damages issues.

Judgment n.o.v. in favor of patient in personal injury action against hospital on the question of negligence and ordering of new trial to determine amount of damages was proper since, in personal injury action, question of how accident happened, who was fault, and pain and injury occasioned there are so intermingled that if trial is ordered, fairness to both parties, it should be on all sues. Hyland v. St. Mark's Hosp., 19 Utah 134, 427 P.2d 736 (1967).

Cited in Collier v. Frerichs, 626 P.2d 47 (Utah 1981); Jepsen v. Tenhoeve, 656 P.2d 42 (Utah 1982); Wilderness Bldg. Sys. v. Chapman, 699 P.2d 766 (Utah 1985).

COLLATERAL REFERENCES

Am. Jur. 2d. — 46 Am. Jur. 2d Judgments §§ 106 to 151; 75 Am. Jur. 2d Trial § 463 et seq.

C.J.S. — 49 C.J.S. Judgments §§ 59 to 61; 88 C.J.S. Trial §§ 249 to 265.

A.L.R. — Dismissal, nonsuit, judgment, or direction of verdict on opening statement of counsel in civil action, 5 A.L.R.3d 1405.

Propriety and prejudicial effect of counsel's argument or comment as to trial judge's refusal to direct verdict against him, 10 A.L.R.3d 1330.

Right to voluntary dismissal of civil action as affected by opponent's motion for summary judgment, judgment on the pleadings, or directed verdict, 36 A.L.R.3d 1113.

Key Numbers. — Judgment ⇐ 199; Trial 167 to 181.

Rule 51. Instructions to jury; objections.

At the close of the evidence or at such earlier time as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in said requests. The court shall inform counsel of its proposed action upon the requests prior to instructing the jury; and it shall furnish counsel with a copy of its proposed instructions, unless the parties stipulate that such instructions may be given orally or otherwise waive this requirement. If the instructions are to be given in writing, all objections thereto must be made before the instructions are given to the jury; otherwise, objections may be made to the instructions after they are given to the jury, but before the jury retires to consider its verdict. No party may assign as error the giving or the failure to give an instruction unless he objects thereto. In objecting to the giving of an instruction, a party must state distinctly the matter to which he objects and the grounds for his objection. Notwithstanding the foregoing requirement, the appellate court, in its discretion and in the interests of justice, may review the giving of or failure to give an instruction. Opportunity shall be given to make objections, and they shall be made out of the hearing of the jury.

Arguments for the respective parties shall be made after the court has instructed the jury. The court shall not comment on the evidence in the case, and if the court states any of the evidence, it must instruct the jurors that they are the exclusive judges of all questions of fact.
(Amended, effective Jan. 1, 1987.)

Amendment Notes. — The 1986 amendment, in the first paragraph, deleted "during the trial" following "time" in the first sentence, made a minor punctuation change in the second sentence, and inserted "of" in the next-to-last sentence; and substituted "jurors" for "jury" in the second sentence in the second paragraph.

Compiler's Notes. — This section varies substantially from Rule 51, F.R.C.P., after which it is patterned.

Cross-References. — Exceptions unnecessary, Rule 46.

NOTES TO DECISIONS

ANALYSIS

Comments on evidence.

—Allowed and disallowed.

This rule does not prevent the trial court from including in its instructions general statements concerning certain types of evidence, nor concerning the burdens of proof and the sometimes varying degrees of proof required; however, this rule does enjoin it from commenting on the quality or credibility of the evidence in such a way as to indicate that it favors the claims or the position of either party. State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972).

—Proper.

In suit for damages for false representations, where one of plaintiffs was a director of defendant company, the trial court's outlining to the jury of the duties of a director was not improper. Douglas v. Duvall, 5 Utah 2d 429, 304 P.2d 373 (1956).

——Accurate statement of facts.

In suit for damages arising out of a truck accident, instructions relating to the effect of meeting an automobile at nighttime and stating that the burning lights on an oncoming automobile obscure objects behind it, included an accurate statement of facts susceptible of judicial knowledge as a matter of law and was not comment on the evidence or expression of opinion. Federated Milk Producer's Ass'n v. Statewide Plumbing & Heating Co., 11 Utah 2d 295, 358 P.2d 348 (1961).

Copy of instructions.

—Delay.

The furnishing of a copy of the instructions to counsel is a convenience and courtesy to him and, where there may have been some delay, but counsel did get his copy during the time the instructions were being given and used the same in taking his exceptions, the delay in furnishing a copy would not be ground for reversal. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

Meaning.

—Entire context.

Instructions should be read in their entire context and given meaning in accordance with the ordinary and usual import of the language as it would be understood by lay jurors. Brunson v. Strong, 17 Utah 2d 364, 412 P.2d 451 (1966).

Necessity of objections.

—Failure to object.

——Appellate review.

A review of error as to the giving or failure to give an instruction where no objection was made will be done only under unusual circumstances and where the interests of justice urgently so demand. Williams v. Lloyd, 16 Utah 2d 427, 403 P.2d 166 (1965).

The Supreme Court may, in its discretion and in the interest of justice, review the giving or failure to give needed instructions even if the defense has failed to make request for instructions in writing. State v. Bell, 563 P.2d 186 (Utah 1977).

——Burden of overcoming.

The burden of showing special circumstances which would warrant a departure from the rule precluding appellate consideration of a claimed error in giving or refusing of instructions not objected to rests upon the party seeking to vary from the rule. McCall v. Kendrick, 2 Utah 2d 364, 274 P.2d 962 (1954).

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto, and the objection must be sufficiently specific to give the trial court notice of the claimed error; while Supreme Court may in its discretion and in the interests of justice review the giving or failure to give an instruction, it is incumbent upon the aggrieved party to present a persuasive reason to invoke such discretion. E.A. Strout W. Realty Agency, Inc. v. W.C. Foy & Sons, 665 P.2d 1320 (Utah 1983).

Where plaintiff did not object below, it cannot raise the failure to give special verdicts or interrogatories on appeal where plaintiff has not met its burden of showing special circumstances warranting such a review. Cambelt Int'l Corp. v. Dalton, 69 Utah Adv. Rep. 6 (1987).

——Court's failure to instruct.

Where defendant submitted no instruction to the court, claim of error as to court's failure to instruct as to "practical acceptance" was without merit. Romrell v. W.W. Clyde & Co., 534 P.2d 867 (Utah 1975).

Although the trial court in a prosecution for theft could have instructed on the value of the property taken, its failure to do so in the absence of a written request did not warrant reversal. State v. Erickson, 568 P.2d 750 (Utah 1977).

——Waiver.

Where plaintiff failed to make an objection to trial court's refusal to give requested instruction to jury, Supreme Court would not review refusal on appeal. Beck v. Dutchman Coalition Mines Co., 2 Utah 2d 104, 269 P.2d 867 (1954).

Where objections urged on appeal were not urged in the trial court they were not considered by the Supreme Court. Steele v. Wilkinson, 10 Utah 2d 159, 349 P.2d 1117 (1960).

Plaintiffs who failed to object to jury instruction at time of trial were precluded from raising issue on appeal. Morgan v. Pistone, 25 Utah 2d 63, 475 P.2d 839 (1970).

Where exceptions to instructions were taken, by agreement of court and counsel, after jury had been instructed and had retired to deliberate, and defendant failed to request instruction on entrapment, trial court was justified in not including such an instruction. State v. Cowan, 26 Utah 2d 410, 490 P.2d 890 (1971).

In order for a party to take advantage of a failure to give a correct instruction, he must have proposed a correct instruction and objected to the trial court's failure to give it. Kesler v. Rogers, 542 P.2d 354 (Utah 1975).

A party may not assign as error the giving of or failure to give an instruction unless they object thereto before the jury retires to consider its verdict. Black v. McKnight, 562 P.2d 621 (Utah 1977).

Even if requested instruction should have been given, plaintiff could not complain of the failure to give it for the reason that he did not except to the court's failure to give that particular instruction. Jensen v. Eakins, 575 P.2d 179 (Utah 1978).

—Opportunity to object.

——Effect of denial.

The parties have a right to make objections to the instructions to preserve challenges to their accuracy, but under the rule that, if a party has no opportunity to object, the absence of an objection does not thereafter prejudice him if counsel was prevented from making objections to instructions, he should be deemed to have done so. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

Any error in court's failure to give counsel opportunity to object to instructions was harmless error where no showing was made that any instruction was improper. Pagan v. Thrift City, Inc., 23 Utah 2d 207, 460 P.2d 832 (1969).

—Purpose of rule.

Purpose of requiring that trial court instructions be objected to in order to preserve any error on appeal is to give the trial court an opportunity to correct any errors or fill any inadequacies in the instructions given so that the jury may consider the case on the proper basis; in order to accomplish that purpose, the Rule should be strictly enforced unless to do so would create a substantial likelihood of injustice. State v. Kazda, 545 P. 2d 190 (Utah 1976); State v. Schoenfeld, 545 P.2d 193 (Utah 1976).

—When made.

——After jury retired.

Common practice of taking exceptions to instructions after jury has been instructed and retired to deliberate is ill advised because it gives trial court and opposing counsel no opportunity to correct errors or omissions which may be pointed out. State v. Cowan, 26 Utah 2d 410, 490 P.2d 890 (1971)

——Before jury retires.

The primary purpose of the requirement that objections to instructions be made "before the jury retires to consider its verdict" is that if the objections call attention to error, correction may be made before the jury goes to deliberate. Hill v. Cloward, 14 Utah 2d 55, 377 P.2d 186 (1962).

——During trial.

The trial judge should be allowed considerable latitude of discretion with respect to the mechanics of procedure, and should not be held in error for requiring counsel to submit proposed instructions during the course of the trial and before he rested his case. Hanks v. Christensen, 11 Utah 2d 8, 354 P.2d 564 (1960).

Oral instructions.

—Necessity.

It is sometimes necessary to instruct a jury orally in order to answer problems which are essential to the jury's having a clear view of the evidence and the issues as the trial proceeds. Weber Basin Water Conservancy Dist. v. Green, 8 Utah 2d 79, 328 P.2d 730 (1958).

—Preservation by court reporter.

There is no error in giving an oral instruction to the jury when the instruction is taken down and preserved by the court reporter. State v. Pace, 527 P.2d 658 (Utah 1974).

Specific instructions.

—Comparative negligence.

——Legal consequence of jury's findings.

The main function of a jury is to be a fact finder; and, in a comparative negligence case tried under Idaho law, it would have been prejudicial error to instruct the jury as to the effect of its findings on the outcome of the case. McGinn v. Utah Power & Light Co., 529 P.2d 423 (Utah 1974).

If requested, a trial court must inform the jury of the legal consequences of apportioning to the plaintiff 50% or more of the negligence it finds in a comparative negligence case, if the effect of such an instruction will not be to confuse or mislead the jury. Dixon v. Stewart, 658 P.2d 591 (Utah 1982).

—Contributory negligence.

——Irrelevant instructions.

Where the trial court took the question of the plaintiff's contributory negligence from the jury because he was only six years old but then, in other instructions on proximate cause made reference to the effect of "the acts and omissions of two or more persons" and "the negligent acts of two or more persons," even

though there was some justification for the charge that irrelevant instructions were given, the issues were presented to the jury fully and fairly and there was no prejudice to the rights of the plaintiff. Hadley v. Wood, 9 Utah 2d 366, 345 P.2d 197 (1959).

—Elements of criminal offense.

——One instruction.

All the elements of the charged crime need not necessarily be included in one instruction, though the better practice is to do so; so long as the jury is informed what each element is and that each must be proved beyond a reasonable doubt, the instructions taken as a whole may be adequate even though the essential elements are found in more than one instruction. State v. Laine, 618 P.2d 33 (Utah 1980).

—Proximate cause and superseding cause.

In case where plaintiff was injured while riding as passenger in jeep that collided with defendant's bus, it was improper for trial court to instruct jury that the jeep driver was the sole proximate cause of the accident if he was negligent in failing to see the bus, since defendant's negligence was not superseded by any negligence on the part of the jeep driver if the latter's negligence was foreseeable. Harris v. Utah Transit Auth., 671 P.2d 217 (Utah 1983).

—Refusing requested instructions.

——Correct statement of law.

The trial court may properly refuse to give requested instructions correctly stating the law when their substance is given in the instructions of the court. Hardman v. Thurman, 121 Utah 143, 239 P.2d 215 (1951).

——Unreliability of eyewitness identification.

Trial court in a criminal prosecution did not err in refusing to give a requested instruction cautioning the jurors about the unreliability of eyewitness identification. State v. Sanders, 27 Utah 2d 354, 496 P.2d 270 (1972).

—Theories of parties.

——Instructions as a whole.

It is the duty of the trial court to cover the theories of both parties in its instructions. In determining whether the court adequately discharged this duty and fairly presented the issues to the jury, the instructions must be considered as a whole. Startin v. Madsen, 120 Utah 631, 237 P.2d 834 (1951).

——Supported by evidence.

Parties are entitled to have their theories of the case presented to the jury in the form of instructions only if they are supported by the evidence. Powers v. Gene's Bldg. Materials, Inc., 567 P.2d 174 (Utah 1977).

—Unavoidable accident.

An instruction on unavoidable accidents, in most cases, is superfluous in view of the other instructions which are given covering the basic issues in accident cases. Wellman v. Noble, 12 Utah 2d 350, 366 P.2d 701 (1961).

Specificity in objections.

—Cure.

——Later motions or briefs.

Expansion on non-specific objections in a motion for a new trial or in a brief on appeal does not cure the lack of timeliness in making proper objections to the trial court. Beehive Medical Elecs., Inc. v. Square D Co., 669 P.2d 859 (Utah 1983).

—Insufficient.

"On the grounds and for the reasons that such instruction is not supported by, and is contrary to, the law and the evidence" does not comply with the requirements of this Rule. Employers' Mut. Liab. Ins. Co. v. Allen Oil Co., 123 Utah 253, 258 P.2d 445 (1953).

Objection to instruction on grounds that it is confusing, misleading, and contrary to the law fails to point out with the requisite degree of particularity wherein the instruction erred; since the purpose of the rule is to direct the attention of the court to any errors in the instruction, the objecting party must state distinctly the matter to which he objects and the grounds of his objection. Redevelopment Agency v. Barrutia, 526 P.2d 47 (Utah 1974).

In order to assign as error the giving of an instruction, a party must object to the instruction, and the objection must be specific enough to give the trial court notice of the very error in the instruction of which the party complains; objections stating that an instruction "is not a correct statement of the law involving the case" and that instructions are "not supported by any evidence in the record" are not specific enough to put the trial court on notice of the claimed error. Beehive Medical Elecs., Inc. v. Square D Co., 669 P.2d 859 (Utah 1983).

Objection failed to meet the requirements of this rule where it pointed to different paragraph of instruction than that challenged on appeal and where objection merely stated that the instruction was "not a correct statement of law" without citing code section it later relied on, in appeal, without specifying with particularity the ground for objection. Godesky v. Provo City Corp., 690 P.2d 541 (Utah 1984).

An objection couched in language such as "the instruction is not suggested by and is contrary to law," or like terms, lacks the specificity required by this rule. Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985).

—Specificity required.

An objection to an instruction should be specific enough to bring to the attention of the court all claimed errors in the instructions and to give the court an opportunity to correct them if the court deems it proper. Employers' Mut. Liab. Ins. Co. v. Allen Oil Co., 123 Utah 253, 258 P.2d 445 (1953).

——Explanation of grounds.

To appeal the giving or the refusal of an instruction, a party must properly object to the instructions in the trial court and explain its grounds, with specificity, for challenging the instructions. Morgan v. Quailbrook Condominium Co., 704 P.2d 573 (Utah 1985).

Written instructions.

—Failure to tender.

——Waiver.

Where plaintiff had failed to tender a written instruction on burden of proof he could not claim error in the lack of such instruction. Fuller v. Zinik Sporting Goods Co., 538 P.2d (Utah 1975).

Cited in Wellman v. Noble, 12 Utah 2d 366 P.2d 701 (1961); Hill v. Cloward, 14 U 2d 55, 377 P.2d 186 (1962); Ortega v. Tho 14 Utah 2d 296, 383 P.2d 406 (1963); Mei Christensen, 15 Utah 2d 182, 389 P.2d (1964); Memmott v. United States Fuel Co Utah 2d 356, 453 P.2d 155 (1969); Telfor Newell J. Olsen & Sons Constr. Co., 25 U 2d 270, 480 P.2d 462 (1971); Flynn v. Harlin Constr. Co., 29 Utah 2d 327, 509 356 (1973); McGinn v. Utah Power & L Co., 529 P.2d 423 (Utah 1974); Henderso Meyer, 533 P.2d 290 (Utah 1975); Lamki Lynch, 600 P.2d 530 (Utah 1979); State v. F 671 P.2d 201 (Utah 1983); Highland Cor Co. v. Union Pac. R.R., 683 P.2d 1042 (U 1984); Gill v. Timm, 720 P.2d 1352 (U 1986); Penrod v. Carter, 737 P.2d 199 (U 1987); King v. Fereday, 739 P.2d 618 (U 1987).

COLLATERAL REFERENCES

Am. Jur. 2d. — 75 Am. Jur. 2d Trial § 573 et seq.

C.J.S. — 88 C.J.S. Trial §§ 266 to 448.

A.L.R. — Propriety and prejudicial effect of instructions in civil case as affected by the manner in which they are written, 10 A.L.R.3d 501.

Sufficiency of evidence, in personal injury action, to prove future pain and suffering and to warrant instructions to jury thereon, 18 A.L.R.3d 10.

Sufficiency of evidence, in personal injury action, to prove impairment of earning capacity and to warrant instructions to jury thereon, 18 A.L.R.3d 88.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon, 18 A.L.R.3d 170.

Propriety and effect, in eminent domain proceeding, of instruction to the jury as to landowner's unwillingness to sell property, 20 A.L.R.3d 1081.

Verdict-urging instructions in civil case stressing desirability and importance of agr ment, 38 A.L.R.3d 1281.

Verdict-urging instructions in civil c commenting on weight of majority view or thorizing compromise, 41 A.L.R.3d 845.

Verdict-urging instructions in civil case monishing jurors to refrain from intransige or reflecting on integrity or intelligence of rors, 41 A.L.R.3d 1154.

Construction of statutes or rules mak mandatory the use of pattern or uniform proved jury instructions, 49 A.L.R.3d 128.

Necessity and propriety of instructing on ternative theories of negligence or breach warranty, where instruction on strict liabil in tort is given in products liability case, A.L.R.3d 102.

Federal Rules of Civil Procedure, constru tion and effect of provision in Rule 51, and si ilar state rules, that counsel be given opport nity to make objections to instructions out hearing of jury, 1 A.L.R. Fed. 310.

Key Numbers. — Trial ⇐ 182 to 296.

Rule 52. Findings by the court.

(a) **Effect.** In all actions tried upon the facts without a jury or with a advisory jury, the court shall find the facts specially and state separately it conclusions of law thereon, and judgment shall be entered pursuant to Rul 58A; in granting or refusing interlocutory injunctions the court shall sim larly set forth the findings of fact and conclusions of law which constitute th grounds of its action. Requests for findings are not necessary for purposes c review. Findings of fact, whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be give